

[*Stambaugh v. Wills Eye Hospital*](#), 98-ERA-13 (ALJ Mar. 16, 1998)
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U.S. Department of Labor
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

DATE: March 16, 1998

CASE NO. 98-ERA-00013

In the Matter of

JOANN STAMBAUGH
Complainant

v.

WILLS EYE HOSPITAL
Respondent

ORDER APPROVING SETTLEMENT
AND
APPROVING WITHDRAWAL OF COMPLAINT

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended 42 U.S.C. § 5851 (1988 and Supp. IV 1992). A "Settlement Agreement and Release" was executed by Complainant and Respondent on March 3 and 9, 1998, respectively, and was submitted for my review and approval on the latter date. Paragraph 1 of the Settlement Agreement states that Respondent will pay Complainant a specified amount. Paragraph 8 of the Settlement Agreement provides protections for Complainant with respect to references that Respondent shall provide to prospective employers. Paragraph 3 of the Settlement Agreement provides that Complainant withdraws the complaint herein.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. §5851(b)(2)(A) (1988).

Macktal v. Secretary of Labor, 923 F.2d 1150, 1153-54 (5th Cir. 1991); Thompson v. U.S. Dep't of Labor, 885 F.2d 551, 556 (9th Cir. 1989); Fuchko and Yunker v. Georgia Power Co., Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

Paragraphs 4 and 7 of the Settlement Agreement provide that Complainant releases Respondent from claims arising under the ERA as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA. Poulos v. Ambassador Fuel Oil Co., Inc., Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2.

Paragraph 6 of the Settlement Agreement contains a confidentiality provision which provides, *inter alia*, that "the provisions of this Settlement Agreement and Release ... shall be maintained on a confidential basis and shall not be disclosed to any person without the express written consent of [Respondent]."

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. §552 (1988) (FOIA) "requires agencies to disclose requested documents unless they are exempt from disclosure...." Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. See also Plumlee v. Alyeska Pipeline Services Co., Case Nos. 92-TSC-7, 10; 92-WPC-6, 7,8,10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; Davis v. Valley View Ferry Authority, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, June 28, 1993, slip op. at 2 n.1 (parties' submissions become part of record and are subject to the FOIA); Ratliff v. Airco Gases, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, June 25, 1993, slip op. at 2 (same).

The records in the instant case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. Further, it would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denial of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70 (1995).

The confidentiality provision in paragraph 6 of the Settlement Agreement could also constitute a "gag provision" that is unacceptable as being against public policy if it precludes Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret this language (quoted above) as not preventing Complainant, either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, state or federal authorities about suspected violations of law involving Respondent. Therefore, paragraph 6 does not contain an invalid gag provision. Thornton v. Burlington Environmental and Phillip Environmental, 94-TSC-2, Sec. Final Order Approving Settlement and Dismissing Complaint, Mar. 17, 1995. Moreover, in the event that this interpretation is incorrect, the aspect of paragraph 6 that would prohibit Complainant from communicating with governmental agencies is herewith severed from the Settlement Agreement, pursuant to paragraph 13 which provides for "severability" of invalid provisions. Paragraph 13 of the Settlement Agreement states:

Severability

The provisions of this Settlement Agreement and Release are severable. If a court of competent jurisdiction rules that any provision of this Settlement Agreement and Release is invalid or unenforceable such a ruling shall not affect the validity or enforceability of any other provision of this Settlement Agreement and Release.

Cf. Wampler v. Pullman-Higgins Company, 84-ERA-13, Sec. Final Order Disapproving Settlement and Remanding Case, Feb. 14, 1994 (the Secretary rejected severance of the gag provision from the remainder of the settlement despite the respondent's acquiescence, as the complainant had requested that the provision be "stricken").

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. Biddy v. Alyeska Pipeline Service Company, 95-TSC-7, ARB Case Nos. 96-109, 97-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Paragraph 10 of the Settlement Agreement states that the Settlement Agreement and Release contains the entire agreement between the parties concerning this matter. Accordingly, the parties have certified that the agreement constitutes the entire and only settlement agreement with respect to Complainant's claims.

Finally, I note that the agreement makes no reference to a fee for Complainant's attorney. Thus, it appears that Complainant will pay her attorney's fee, if any. The Secretary has held:

Where attorney's fees are incorporated in an agreement, the ALJ does not approve the fee amount. If, however, the parties submit an agreement providing for Complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by Complainant is fair, adequate and reasonable.

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Tinsley v. 179 South Street Venture, 89-CAA-3, Sec. Order of Remand, Aug. 3, 1989, slip op. at 3. In more recent decisions the Secretary has held that it is not necessary for a settlement to specify the amount of an attorney's fee. Guity v. Tennessee Valley Authority, 90-ERA-10, ARB Case No. 96-180, Aug. 28, 1996; Klock v. Tennessee Valley Authority, 95-ERA-20, OAA May 1, 1996. Therefore, there is no requirement that the settlement agreement in the instant case include the amount of the attorney's fee for which the Complainant is responsible.

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I APPROVE the agreement and APPROVE THE WITHDRAWAL OF THE COMPLAINT WITH PREJUDICE.

SO ORDERED.

Robert D. Kaplan
Administrative Law Judge